(2)

No. 03-1137

Supreme Court, U.S.
FILED
MAR 10 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

ANTONIA C. NOVELLO, IN HER INDIVIDUAL AND OFFICIAL CAPACITY, PETITIONER

v.

MARIO DIBLASIO, M.D. AND MARIO DIBLASIO, M.D., P.C., RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

MARINA TRAMONTOZZI
Counsel of Record

KEVIN J. HARRINGTON
JOHN C. MASCARI
GERALDINE A. CHEVERKO
HARRINGTON, OCKO & MONK, LLP
81 Main Street, Suite 215
White Plains, New York 10601
(914) 686-4800
Attorneys for Respondent

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 223-3160 ♦ USSCINFO.COM

QUESTION PRESENTED

Whether the Second Circuit correctly decided: (1) that the summary suspension procedure set forth under New York Public Health Law §230(12)(a) did not share enough of the characteristics of the judicial process as outlined in this Court's decision in *Butz v. Economou* to entitle Petitioner to absolute immunity from suit; and (2) that the New York State Commissioner of Health was not functioning in a manner sufficiently analogous to a prosecutor or judge in the investigation and ultimately the summary suspension of Respondent's medical license?

PARTIES TO THE PROCEEDING

Petitioner, defendant-appellee in the court below, is Antonio C. Novello ("Petitioner") in her individual capacity. Defendant-Appellee in the court below, Lisa Hampton, is not a petitioner in this action.

Respondents are Mario DiBlasio, M.D. and Mario DiBlasio, M.D., P.C ("Dr. DiBlasio").

CORPORATE DISCLOSURE STATEMENT

Respondent Mario DiBlasio, M.D. is an individual who resides at 385 McLean Avenue, Apartment 12G, Yonkers, New York 10705. Respondent Mario DiBlasio, M.D., P.C. is a professional corporation organized and existing under the laws of the State of New York.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 11

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

BARRY V. BARCHI, 443 U.S. 55 (1977) 27

BUCKLEY V. FITZSIMMONS, 509 U.S. 259, 274 (1993) ..... *passim*

BURNS V. REED, 500 U.S. 478, 486, 87 (1991) 12

BUTZ V. ECONOMOU, 438 U.S. 513-14..... 13, 14, 15, 16, 25

CLEAVINGER V. SAXNER, 474 U.S. 193, 202 (1985) 13

DEROSA V. BELL, 24 F.SUPP.2D 252, 257 (D. CONN. 1998) 20, 21

DUNHAM V. WADLEY, 195 F.3D 1007, 1010-11 (8TH CIR. 1999) 11, 18

HODEL V. VIRGINIA SURFACE MINING & RECLAMATION ASSOC., INC., 452 U.S. 264, 301-02 (1981) 28

HORWITZ V. STATE BD. OF MEDICAL EXAMINERS OF STATE OF COLO., 822 F.2D 1508 (10TH CIR. 1987) 12, 18

MISHLER V. CLIFT, 191 F.3D 998 (9TH CIR. 1999) 11, 14

MOORE V. GUNNISON VALLEY HOSPITAL, 310 F.3D 1315, 1316 (10TH CIR. 2002) 18

O'NEAL V. MISSISSIPPI BOARD OF NURSING, 113 F.3D 62, 66 (5TH CIR. 1997) 14

OSTRZENSKI V. SEIGEL, 177 F.3D 245, 251-52 (4TH CIR. 1999) 13

YOUNG V. SELSKY, 41 F.3D 47, (2ND CIR. 1994) 27

WANG V. NEW HAMPSHIRE BD. OF REGISTRATION IN MEDICINE, 55 F.3D 698, 702 (1ST CIR. 1995) 11

WATTS V. BURKHART, 978 F.2D 269, 275-76 (6TH CIR. 1992) 11, 17, 25, 26

WITHROW V. LARKIN, 421 U.S. 35, 54 (1975) 29

OTHER AUTHORITIES

N.Y. Public Health Law § 230 ..... *passim*

STATEMENT OF THE CASE

A. Introduction

There is no conflict among the circuit courts of appeals in deciding cases where state officials involved in summary disciplinary proceedings of physicians are claiming absolute immunity from suit. The Second Circuit did not depart from the decisions of this Court or other courts of appeal when it analyzed and rejected the claim of absolute immunity by the New York State Commissioner of Health. **Every** case decided by this Court and by the circuit courts weighs the six factors outlined in *Butz v. Economou* and reviews the state law procedures at issue to determine whether they are sufficiently similar to a judicial proceeding to warrant absolute immunity. 438 U.S. 478, 512 (1978). **Every** case decided by this Court and by the circuit courts turns on the factual issues presented including, *inter alia,* analysis of the role(s) of the public official at issue and whether procedural safeguards exist under the particular state statutory scheme to adequately protect against unconstitutional conduct.

After a detailed and careful review of the *Butz* factors and application to the facts and state law procedures in this case, the Second Circuit correctly concluded that "the summary procedures provided in § 230 are insufficiently similar to a judicial proceeding to warrant absolute immunity, and . . . [the Commissioner of Health's] . . . role in the summary suspension was [not] 'functionally comparable' to that of a judge or prosecutor" (App. 18a).

Any attempt by Petitioner to create an illusory conflict between the Second Circuit and this Court as well as other circuit courts cannot withstand scrutiny and should not be the basis for granting this petition. The summary suspension procedure at issue in this action was determined by the Second Circuit to "inadequately protect physicians from

wrongful deprivation of their professional 'licences'" (App. 12a). Indeed the statute was found to give the commissioner "virtually unfettered authority to determine whether a physician's license should be summarily suspended" and thereby seriously undermined the efficacy of the limited procedural safeguards afforded a physician under § 230 of the New York Public Health Law ("PHL") (App. 13a). The so called "conflict" between the circuits is not a conflict, but rather the result of circuit courts consistently and uniformly applying the six *Butz* factors to different state statutory schemes and examining the conduct, roles and functions of different state officials operating under these various and different state laws. Any divergence in rulings in the few instances where circuit courts have applied absolute immunity analysis to summary medical disciplinary procedures, results from significant differences in the statutory procedures in those states and the roles of the different officials against whom claims were made. In each instance the circuit courts have properly applied the *Butz* factors. Not surprisingly, significant differences in the summary suspension procedures exist from state to state. Given these differences, as is to be expected, even the few circuit courts which have completed a *Butz* analysis have reached different outcomes. Furthermore, each and every case cited by Petitioner as being in conflict with this Second Circuit decision is limited to granting immunity to members or directors of the medical board adjudicating the suspension or the board's counsel. Immunity is not extended beyond those participants.

It is important to note that Petitioner is only appealing from that portion of the Second Circuit's ruling relating to absolute immunity. Those portions of the Second Circuit decision for which a petition for a writ of certiorari has **not** been requested include, *inter alia,* the finding that Petitioner's defamatory statements made during press conferences were not 'random and unauthorized acts' and, as

a result, Dr. DiBlasio properly alleged a "stigma plus" due process violation; the finding that Dr. DiBlasio's due process claims were not barred under the *Rooker-Feldman* doctrine; the finding that Defendant Hampton was not entitled to absolute immunity; and the finding that Dr. DiBlasio's state law claims were erroneously dismissed by the lower court. Thus, the remainder of this action has been properly remanded and will proceed before the district court. Although Respondent firmly believes that he will prevail on all matters remanded to the district court, the fact that Petitioner can successfully seek to defend all of the claims at issue on the merits should persuade this Court that this case is not worthy of certiorari review. Respondent emphatically believes that such petition should be denied in that this is an interlocutory appeal of a single issue in an ongoing case.

As there has been no discovery allowed in this action to date, there are numerous unresolved contentious factual disputes between the parties relating to Petitioner's activities which were not summarized in the petition for certiorari. These disputed factual issues have a direct bearing on the absolute immunity issue. The nature of Petitioner's involvement is far broader than the facts noted in the petition and includes investigative misconduct occurring prior to Dr. DiBlasio even being considered for misconduct charges, before any probable cause existed and, therefore, before absolute immunity could possibly attach. *See Buckley v. Fitzsimmons,* 509 U.S. 259, 274 (1993). These omitted facts include: (1) Petitioner's inappropriate influence over the State's sole medical investigator resulting in admitted bias (JA 193-95, 199-202)[1]; (2) Petitioner's decision to order summary suspension without satisfying the first statutory

---

[1] References to "JA" refer to the Joint Appendix submitted to the Second Circuit upon Respondent's appeal of the district court decision.

condition precedent that Respondent be given an interview with counsel present, notice and a meaningful opportunity to explain the issues under investigation; (3) Petitioner's decision to order summary suspension without satisfying the second statutory condition precedent that an investigative committee make a finding or recommendation that Respondent's continued medical practice poses an imminent danger; and, further (4) Petitioner's defamatory and stigmatizing comments concerning Dr. DiBlasio's suspension made during several press conferences and press releases (JA 59-76) in violation of statutory requirements to maintain strict confidentiality with regard to physician disciplinary proceedings (with the sole exception that the summary order be made public). Indeed, during the press conferences Petitioner's remarks included false accusations that Dr. DiBlasio was responsible for the possible deaths of innocent women and that he might be criminally prosecuted. These disparaging remarks, which could only serve to sabotage Dr. DiBlasio's career, were duly acknowledged by the Second Circuit in its decision to reverse the district court's decision and remand the case for further proceedings. (App. 4a). Petitioner does **not** claim absolute immunity from the claims involving her press statements.[2]

B. Factual Background

1. Statutory Framework

When a doctor is suspected of possible professional misconduct, § 230 of the PHL governs the physician disciplinary proceedings concerning such suspected misconduct and establishes the conditions under which a

---

[2]Nor could Petitioner properly claim such immunity. *See Buckley,* 509 U.S. at 278; *Butz,* 438 U.S. 478, 489 (1978).

physician's license can be suspended. *See* §§ 230(10) & 12(a). § 230 also contains procedures whereby a physician's license can be summarily suspended before a full investigation and hearing is conducted. *See* §230(12)(a).

However, § 230(12)(a) allows the commissioner of the DOH to summarily suspend a physician's license if, "after an investigation and a recommendation by [the investigative committee], based upon a determination that a licensee is causing, engaging in or maintaining a condition or activity which in the commissioner's **opinion** constitutes an imminent danger . . . that it therefore appears to be prejudicial . . . to delay action until an opportunity for a hearing can be provided." § 230(12)(a) (emphasis added). Section 230(12) of the PHL allows for a summary order to be made public upon issuance. After a summary order issues, the Board must commence a hearing proceeding within ten days and to be completed within ninety days to determine whether by a preponderance of the evidence, the licensee is causing, engaging in or maintaining a condition or activity which constitutes an imminent danger. *See id.* However, the commissioner may, as she did in this case, ignore any such recommendation of the investigative committee and leave the summary order in effect even where the investigative committee fails to find imminent danger. *See id.* Under § 230-c, an administrative review board for professional medical conduct is created for the purpose of reviewing determinations of the investigative committee. However, this administrative review board **cannot** review, modify or reverse a commissioner's summary order. § 230-c.1.

The net effect of this statutory scheme is that the post-deprivation hearing before the Board's hearing committee provides no real check on the commissioner's actions in summarily suspending a physician. The statute first allows the commissioner to summarily suspend a physician's license based upon little or no evidence at all - - the only benchmark used is whether in her opinion the physician's activities

constitute an imminent danger. The statute then calls for a hearing by the state board for professional conduct including an interim determination on the continuation of the suspension. However, regardless of the determination reached during this hearing, the statute allows the commissioner to reject the hearing committee's recommendation that the summary suspension be lifted based solely upon her "opinion" and the power afforded by her position. The commissioner's summary suspension order is not reviewable by the review board, nor through any other administrative board, agency or department.

2. Facts Material to the Consideration of the Question Presented

Dr. DiBlasio brought this action against Defendants Novello, Hampton and the New York State Department of Health ("DOH") based on the DOH's investigation of Dr. DiBlasio and the resulting summary suspension of his license. (JA 7-58). The investigation of Dr. DiBlasio was conducted when Dr. DiBlasio was an independent contractor for Bier, P.C., a contractor providing mammography readings and subsidized breast cancer screening and education.

The investigation began with the billing practices of Dr. Bier, billing practices in which Dr. DiBlasio had no involvement. The alleged billing irregularities by Dr. Bier, combined with the possible negligent medical treatment of a vulnerable, under-served minority patient population, quickly identified this investigation as having possible widespread media appeal. It is alleged that Petitioner directed the investigation to ensure a pre-ordained outcome of summary suspension, news conferences and headline stories on television and print media.

The procedural safeguards set forth in Section B.I, *supra,* evaluated by both the District Court and Second Circuit to be limited at best, did not provide minimum due

process protections. (App. 12a - 16a, 60a). In fact, Dr. DiBlasio was denied even those very limited procedural safeguards required under New York law. Dr. DiBlasio's statutory right, under PHL 230(10)(a)(iii), to be given meaningful written notice of the issues involved in the investigation, the right to provide an explanation of the issues under investigation, the right to have counsel present, and the right to submit written comments and/or expert opinion to the Office of Professional Medical Conduct ("OPMC") were systematically subverted by Petitioner during each phase of the investigation leading up to the summary suspension process.

Dr. DiBlasio was given last minute verbal notice of the meeting, making it impossible for him to retain counsel and prepare for the interview. Dr. DiBlasio was not told that he was under investigation or the issues under review. Dr. DiBlasio was not told that he could have a lawyer present, nor given any meaningful opportunity to submit evidence or expert opinion prior to being deprived of his medical license.

The written notice belatedly received by Dr. DiBlasio was untimely and inadequate - - it was provided to him on a weekend, less than one business day before he was required to attend a meeting several hours from his home on the morning of Monday, May 22, 2000. The only issue stated in the "notice" letter was Dr. DiBlasio's treatment of fifty patients without any reference to any issues relating to those fifty patients. Dr. DiBlasio was not given access to the relevant medical records or a meaningful opportunity to seek legal or professional expert assistance.

Not only were the clinical issues under investigation left undefined, but the belated notice given to Dr. DiBlasio was deliberately mischaracterized as a "form letter" in a deliberate attempt to minimize the significance of the investigation. The written notice failed to mention either of the two issues under investigation and even at the "interview" held on May 22nd, Dr. DiBlasio was still not advised of either

of these issues.

Dr. DiBlasio was deliberately deceived about the significance of the May 22nd interview, was told that he was not a target of the investigation and told that the purpose of the interview was to simply confirm whether or not he had read certain mammograms. (JA 290-91, 293). The pretense given for the interview was that Dr. Bier was reportedly claiming for the first time that Dr. DiBlasio had read these films. Dr. DiBlasio was advised not to be concerned since the OPMC knew he was not involved in billing matters. Thus, Dr. DiBlasio was misled into appearing at a pretextual meeting on extremely short notice, unprepared and without counsel. This made it appear as though Dr. DiBlasio was afforded the investigative "interview" required under the PHL, an interview which is a condition precedent to the convening of an investigative committee where possible charges would be considered.

As noted *supra*, the investigation conducted by the DOH was tainted with improprieties from its inception. These improprieties included a statistical and clinical investigation wherein the investigator intentionally ignored the known data anomaly which leads to low breast cancer detection rates and skewed the "representative" statistical sample by allowing Dr. Bier, himself the subject of a DOH investigation, to select a majority of the patient files comprising the "representative" sample. The State's sole medical investigator, Dr. Silk, was fed inappropriate information to such an extent that he admitted under oath that he was biased based on comments indicating that Petitioner, the commissioner of the DOH, had a "tremendous interest" in the outcome of this investigation and similar damaging comments that one of his well-respected colleagues had found evidence that Dr. DiBlasio was responsible for a "big missed cancer." (JA 193-95, 199-202). These comments improperly led Dr. Silk to falsely form the conclusion in the draft report submitted to the investigative committee that Dr.

DiBlasio had failed to detect a large cancer and had negligently misinterpreted mammograms. (JA 178, 191, 194-95, 196, 199-202, 224-27, 228-29). Finally, under Petitioner's direction the DOH suppressed the preparation of Dr. Silk's final report after Dr. Silk learned that repeat mammograms had been given to all of the women being studied and in **each and every case** Dr. DiBlasio's medical findings had been correct. (JA 238-39). If preparation of a final report had not been suppressed, many of the false accusations in the draft report, including the missed cancer claim, would have undoubtedly been withdrawn by Dr. Silk before the case was ever submitted to the investigative committee and the fact that repeat mammograms had confirmed Dr. DiBlasio diagnosis as correct in each and every case would have come to light.

The case against Dr. DiBlasio was presented jointly with the case against Dr. Bier to the investigative committee, although all of the inflammatory charges of billing fraud against Dr. Bier were unrelated to Dr. DiBlasio. The case transmittal form of the joint case against Drs. Bier and DiBlasio was entitled "FRAUDULENT PRACTICE, NEGLIGENCE AND INCOMPETENCE" and "FRAUDULENT PRACTICE-OTHER." This captioning was unduly prejudicial and unfair to Dr. DiBlasio, when it was already known that he was not involved in the billing issues giving rise to the fraudulent practice claim. (JA 339).

The report contains no allegation of imminent danger against Dr. DiBlasio by Dr. Silk; allegations of imminent danger are only alleged against Dr. Bier. (JA 340). As a result, Dr. DiBlasio has alleged, upon information and belief, that no competent evidence of imminent danger was submitted against him and no recommendation of imminent danger was actually made by the investigative committee against him. Hence, it is alleged that Petitioner did not act to suspend Dr. DiBlasio based upon a recommendation of the investigative committee as required by law, but based solely

upon her administrative power to do so.

Moreover, although exigent circumstances are required in order to invoke the summary suspension procedures, numerous facts known to Petitioner demonstrate that no emergency existed. As early as March 22, 2000, DOH was well aware that most cases of low breast cancer detection statistics revolved around miscoding of forms or misinterpretation of its requests for data, and were not indicative of genuine clinical problems. (JA 365). Yet, the decision was made not to investigate whether these clerical errors had occurred at Bier, P.C. To further negate any reliance on exigent circumstances, it was also known that Dr. Silk had ultimately agreed with and independently confirmed through retake mammographies that Dr. DiBlasio's diagnosis was correct in all of the fifty patients identified by the DOH. (JA 206, 208).

Instead of simply making the summary order public, as allowed by the statute, Petitioner called and held at least two press conferences and issued several press releases making defamatory and stigmatizing statements concerning Dr. DiBlasio's medical practice. The defamatory statements made by Petitioner went far beyond the scope of her duties as commissioner and were in direct violation of a statute that requires that pending physician disciplinary proceedings remain strictly confidential until due process adversarial hearings are concluded and then only if the physician is ultimately disciplined. Only the summary **order** is to be made public. *See* PHL § 230(12)(a). Unproven allegations against a physician must remain confidential. *See* PHL § 230(10)(g). Despite these unequivocal statutory prohibitions, Petitioner called two press conferences at which she made false and defamatory statements. These statements: (1) described the circumstances and unproven factual allegations surrounding the ongoing investigation; (2) falsely suggested that Dr. DiBlasio committed fraud; (3) falsely stated that Dr. DiBlasio was an unjustly enriched thief; (4) falsely stated that

he was responsible for the possible deaths of innocent women; and (5) stated that he should be or might be criminally prosecuted. These statements caused permanent damage to Dr. DiBlasio's reputation.

REASONS FOR DENYING THE PETITION

I. The Second Circuit is in Accord with Rulings of this Court and Other Courts of Appeals

This decision by the Second Circuit does not conflict with either this Court or other circuits where a similar absolute immunity issue has been decided. None of the courts or decisions noted by Petitioner address the same or even remotely similar summary suspension powers afforded to the commissioner under New York State Public Health Law or a defendant who had responsibilities identical to this commissioner. Instead, the other circuits have decided upon facts significantly different from those now before this Court -- the statutes analyzed by the other circuits have been found to contain adequate procedural safeguards to protect against unconstitutional conduct. The finding of absolute immunity has been reserved **only** for members of the medical board and physicians who served on hearing committees to review evidence presented and thus have duties intimately associated with the judicial process.[3] Neither this Court nor any other

---

[3] *See e.g., Wang v. New Hampshire Bd. of Registration in Medicine*, 55 F.3d 698, 702 (1st Cir. 1995) (extending absolute immunity only to Board members and its counsel); *Watts v. Burkhart*, 978 F.2d 269, 278 (6th Cir. 1992) (en banc) (extending absolute immunity to physician members of the Board upon finding that their positions are akin to that of judges and enough safeguards exist to protect a physician's constitutional rights); *Dunham v. Wadley*, 195 F.3d 1007, 1010-11 (8th Cir.), *cert. denied* 531 U.S. 819 (2000) (extending absolute immunity only to members of the Board); *Mishler v. Clift*, 191 F.3d 998, 1008-09 (9th Cir. 1999) (granting absolute immunity only to the Board members for acts "closely associated with the judicial process" but denying absolute

circuit has categorically granted absolute immunity to a commissioner who could be classified as "overseer of the investigation", "initiator of charges", and "final arbiter of the decision to impose and sustain the summary suspension". (App 16a).

Absolute immunity, which the Supreme Court has been "quite sparing" in recognizing, applies to officials performing "special functions" which, because of their similarity to functions which would have been immune when Congress enacted § 1983, deserve absolute protection from damages liability. *Buckley,* 509 U.S. at 268-69. When determining whether the immunity is qualified or absolute, "[t]he presumption is that qualified rather than absolute immunity is sufficient to protect [most] government officials in the exercise of their duties." *Burns v. Reed,* 500 U.S. 478, 486, 87 (1991).

Absolute immunity is accorded to judges and prosecutors functioning in their official capacities; absolute immunity is also extended, under certain circumstances, to officials of government agencies who perform certain functions analogous to those of a judge. *Butz,* 438 U.S. at 515. Six non-exhaustive factors are considered when determining whether the non-judicial officers functions share the characteristics of a judicial function. These factors are:

> (a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling

---

immunity for actions falling outside the protections of absolute immunity); *Horwitz v. Board of Medical Examiners of State of Colorado*, 822 F.2d 1508, 1515 (10th Cir. 1987) (holding that members of the State Board of Medical Examiners are entitled to absolute immunity based on the prosecutorial role served and finding their duties functionally comparable to a court of law).

> unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of the error on appeal.

Cleavinger v. Saxner, 474 U.S. 193, 202 (1985) (citing *Butz*, 438 U.S. at 512).

The Supreme Court has held that absolute immunity is appropriate when an official's functions are similar to those in the judicial process, *see Butz*, 438 U.S. at 512-13, an official's actions are likely to result in litigation, *see id.* at 515, and sufficient safeguards exist in the regulatory framework to control unconstitutional conduct. *See id.* at 512.

The Second Circuit reviewed the nature of Petitioner's responsibilities in determining the appropriateness of absolute immunity; the court could not merely rely upon Petitioner's title and stature within the DOH. None of the other circuit decisions noted by Petitioner extended absolute immunity beyond members of the medical board, directors of the board and its counsel, whose acts were closely associated with the judicial process. Petitioner in this case does not fall within these narrowly drawn categories.

In *Ostrzenski v. Seigel*, 177 F.3d 245, 251-52 (4th Cir. 1999), a case cited by Petitioner, a medical doctor brought a suit against another doctor who conducted a peer review of Ostrzenski at the behest of the Medical Board of Physician Quality Assurance. After carefully analyzing the Maryland Medical Practice Act which governs the licensing and disciplining of physicians in Maryland, the Fourth Circuit noted that the Act contained "adequate procedural safeguards" to specifically protect physicians against unconstitutional conduct by peer reviewers and that the specific functions performed by the defendant were analogous to that of a prosecutor. *Id.* at 251.

There are no such adequate procedural safeguards in the PHL to protect against unconstitutional conduct by the commissioner in the provisions related to the summary suspension procedures under § 230(12). Indeed, the Second Circuit held that "§ 230 inadequately protects physicians from wrongful deprivation of their professional licenses." (App. 12a). The Second Circuit correctly noted that although § 230 of the PHL provides some protections during the summary suspension process, "the efficacy of those procedures are seriously diminished by other features of § 230." (App. 12a). Moreover, after analyzing the protections afforded to physicians, the Second Circuit determined that the commissioner "has virtually unfettered authority to determine whether a physician's license should be summarily suspended." (App. 13a). *See also Mishler v. Clift*, 191 F.3d 998 (9th Cir. 1999) (granting absolute immunity only to Medical Board members for acts "closely associated with the judicial process" and only after noting, while reviewing the *Butz* factors, that the Nevada Board performs its duties and functions under a comprehensive umbrella of statutes and that the Nevada Administrative Procedure Act provides adequate safeguards comparable to those available under federal law); *O'Neal v. Mississippi Board of Nursing*, 113 F.3d 62, 66 (5th Cir. 1997) (holding that the Medical Board and its Director were immune only after finding that at least five of the six *Butz* factors were sufficiently satisfied including a determination that the Mississippi statutes contained a multitude of safeguards reducing the need for private damage claims).

A careful review of Petitioner's responsibilities under New York's PHL, in conjunction with the factors outlined by this Court in *Butz*, clearly indicate that Petitioner's responsibilities under the summary suspension procedures do not share enough of the characteristics of the judicial process to afford her absolute immunity.

A. Petitioner's Role in the Summary Suspension Procedure of PHL § 230(12) Only Entitles Petitioner to Qualified Immunity Under *Butz*

The Petitioner functions as neither "prosecutor" nor "judge" in the summary suspension proceeding. The function of prosecutor is filled by the director of the OPMC of the Board for Professional Medical Conduct ("BPMC") and attorneys working for OPMC. PHL § 230(10)(a).

Investigations of physician discipline cases are conducted by OPMC staff. PHL § 230(10)(a). The results of investigations are referred to an investigative committee ("IC") of the BPMC. *See* PHL § 230(10)(a)(iv). Hence, it is the OPMC director, members of the IC and their counsel who have the "special function" of prosecutors in initiating and prosecuting charges, as identified in *Butz*. 438 U.S. at 508.

Once charges are initiated, a Hearing Committee ("HC") of the BPMC is convened to consider the charges and evidence in support of same. Proceedings of the HC are conducted before a hearing officer (who shall be an) attorney, with authority to rule on objections, motions, privileges and the like. Hence, it is the members of the HC and the hearing officer who occupy the role(s) of judge of the proceedings, the "special function" entitled by *Butz* to absolute immunity.

The *Butz* Court held that absolute immunity **only** applied to the limited class of persons acting in the function of prosecutor, judge or counsel. All other executive branch officials exercising discretion are entitled to only qualified immunity.

> This is not to say that considerations of public policy fail to support a limited immunity for federal executive officials. We consider here, as we did in *Scheuer*, the need to protect officials who are required to exercise their discretion and the related public interest in

> encouraging the vigorous exercise of official authority. Yet *Scheuer* and other cases have recognized that it is not unfair to hold liable the official who knows or should know he is acting outside the law, and that insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment. We therefore hold that, in a suit for damages arising from unconstitutional action, federal executive officials exercising discretion are entitled only to the qualified immunity specified in *Scheuer*, subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business.

Butz, 438 U.S. at 506-07.

In *Butz*, the Supreme Court distinguished between the discretionary function of a senior agency official who must often act swiftly and on the basis of factual information supplied by others from the "special function" of other defendants who acted as prosecutors, judges or counsel. The *Butz* Court reserved absolute immunity as only applicable to the narrow class of those "special functions". For other senior executive officials in both the state and federal government, the protections afforded by qualified "good faith" immunity were deemed sufficient.

In the instant case Petitioner did not act as prosecutor - -she did not frame legal charges, present the evidence or sit on the IC. Moreover, she was not a member of the Medical Board or the HC, nor was she the hearing officer involved in Respondent's disciplinary hearings. It is not believed that she even attended any of those proceedings. Rather, Petitioner issued a summary suspension based upon her "opinion" that Respondent posed an imminent danger to public health and deserved to be summarily suspended. PHL § 230(12). It is

alleged that Petitioner exercised her discretion in blatant disregard of even the minimal due process protections to be afforded under the summary suspension procedures of the PHL which embody constitutional due process principals. It is also alleged that Petitioner's misconduct during the early stages of the investigation, prior to a finding of probable cause, transgressed clearly established constitutional rules of due process embodied in various PHL statutory requirements including the right to notice, opportunity to be heard, right to counsel, right to exculpatory evidence and the right to equal treatment in good faith. Accordingly, in exercising her discretionary executive function, Petitioner is only entitled to qualified and not absolute immunity.

B. Summary Suspension Proceedings are not Sufficiently Similar to a Judicial Proceeding to Warrant Absolute Immunity Under *Butz*

The summary suspension provisions set forth in PHL § 230(12) are not sufficiently similar to a judicial proceeding to warrant absolute immunity. Although a few circuits have extended absolute immunity to state officials who impose summary suspensions in medical disciplinary proceedings, it is not their status as a state official which tips the determination of absolute immunity in their favor. Instead, each circuit carefully reviews the *Butz* factors, as did the Second Circuit in the instant matter, paying particular attention and affording the appropriate weight to the regulatory framework in place to control unconstitutional conduct under that particular state's statutory scheme. *See Watts v. Burkhart,* 978 F.2d 269, 275-76 (6th Cir. 1992) (providing absolute immunity only for the professionals who are members of Tennessee Board of Medical Examiners and only after finding that the Tennessee Administrative Procedures Act provides procedural safeguards comparable to

those provided by corresponding federal law, all of these safeguards are applicable to medical license revocation proceedings, the pertinent section of the Tennessee code governing summary suspensions "scrupulously protects" the fundamental right of notice and opportunity to be heard including an **in person** hearing with the licensee present, notice of charges and right to counsel; and that under the procedures for summary suspension the committee must incorporate a finding in its order indicating the public health, safety or welfare imperatively requires emergency action); *Dunham v. Wadley,* 195 F.3d 1007, 1010-11 (8th Cir. 1999) (case not involving summary suspension, granted immunity only to members of State Board of Veterinary Medical Examiners and only after concluding that sufficient safeguards exist in the Arkansas regulatory framework to control unconstitutional conduct and that under the relevant portions of the Arkansas Code the board was empowered to conduct investigations, hold hearings, administer oaths, receive evidence, issue subpoenas, make factual determinations and enter orders consistent with the findings thus weighing towards a decision that the duties of the board were functionally comparable to the duties performed by courts); *Horwitz v. State Bd. of Medical Examiners of State of Colo.*, 822 F.2d 1508 (10th Cir. 1987) (providing absolute immunity only for Medical Board members and only upon finding that there must exist sufficient safeguards in the regulatory framework to control unconstitutional conduct before it can be determined that an administrative official performs functions analogous to those of judges and prosecutors and should be granted absolute immunity).

In another case before the Tenth Circuit, *Moore v. Gunnison Valley Hospital,* absolute immunity was **denied** to the peer review committee that temporarily suspended a doctor from practicing medicine at the hospital. 310 F.3d 1315, 1316 (10th Cir. 2002). A review of the *Butz* factors led the court to determine, as did the Second Circuit in the instant

matter, that no procedural protections were available to the physician, that the members of the committee lacked the independence typical of a judicial body, there appeared to be nothing in the record indicating that prior decisions were utilized as precedent by the committee, or that the physician was able to challenge those actions before they became effective. *Id.* at 1317-18. Thus, the Tenth Circuit concluded that the peer review process utilized to summarily suspend a physician's license lacked the significant characteristics of a judicial body entitled to absolute immunity.

In the instant case the Second Circuit found that four of the *Butz* factors weighed against granting absolute immunity to Petitioner. These four factors include: (1) the total absence of safeguards in the summary suspension procedures; (2) the summary suspension process was not adversarial; (3) the decision is not truly correctable on appeal; and (4) there was no indication that the commissioner relied upon any legal precedent in making the decision. The two remaining *Butz* factors found to weigh in favor of absolute immunity include the court's assumption that the commissioner is not removable at will and is insulated from political influence; and that the suspension of a physician's license pursuant to § 230 is likely to stimulate a litigious reaction. (App. 11a).

(i) No Procedural Safeguards are Present in the Summary Suspension Process

As recognized in *Butz*, procedural safeguards must be in place to protect against unconstitutional conduct. However, the evidentiary standard in the summary suspension procedure at issue in this action cannot be called a safeguard to protect against unconstitutional conduct. According to § 230(12)(a) no evidentiary finding is required by the investigative committee, "only a determination that the licensee is causing, engaging in, or maintaining a condition or

activity which in the commissioner's **opinion** constitutes an imminent danger to the health of the people." PHL § 230(12)(a) (emphasis added). Based on a plain reading of the statute, the statute empowers the commissioner to summarily suspend a physician's license based solely on her opinion. Although the statute requires a recommendation by an investigative committee, the commissioner is not obligated to follow any such recommendation. *See id.* Furthermore, the statute contains none of the procedural safeguards necessary to protect against the very kind of overreaching by an overzealous commissioner as occurred in this case.

In *DeRosa v. Bell*, a case in which the facts and legal reasoning are strikingly similar to the instant matter, the court found that during the summary suspension phase of the plaintiff's day care license, the plaintiff was not entitled to any of the safeguard features found in a judicial proceeding. 24 F.Supp.2d 252, 257 (D. Conn. 1998). The district court rejected the notion that the commissioner of health had just one function and was entitled to quasi-judicial absolute immunity. *Id.* at 256. The court's rationale was based upon the fact that during the summary suspension stage, the plaintiff was not entitled to any of the safeguard features that make the hearing stage similar to a judicial proceeding. *Id.*

Although the *DeRosa* defendants likened the summary suspension process to a judge issuing an *ex parte* temporary restraining order, the district court found this to be a flawed analogy and determined that "the materials on which the decision were based were not brought before the Commissioner by an independent party seeking an adjudication, but rather by her own staff, who received the information through an interagency information sharing agreement." *Id.* at 257. Moreover, the court noted that simply because an official makes a decision based on information brought before them, "this does not transform an executive action into a judicial action." *Id.* The court found "[t]he *ex parte* TRO . . . a particularly misleading example

because it is one of the few judicial actions that is not subjected to the rigors of adversary process." *Id.*

As in *De Rosa*, the Petitioner based her "opinion" on information received from her own agency, not from information brought before her by an independent party. Also, as in *De Rosa*, Petitioner cannot squeeze into the cloak of quasi-judicial absolute immunity. The ease with which Petitioner denied Dr. DiBlasio the minimal due process protections contained in the summary suspension procedures demonstrates that the procedures are patently insufficient and do not safeguard a physician from unconstitutional conduct.

After careful consideration and analysis the Second Circuit found that "although [§ 230] provides some protection to physicians subjected to summary suspension proceedings, the efficacy of those procedures are seriously diminished by other features of § 230." (App. 12a). The court noted that the hearing committee could only suggest a course of action while the commissioner retained final authority to summarily suspend a physician's license; although the hearing committee must initiate a suspension, "the independence of that body is severely undermined by the commissioner's appointment and removal power;" and, most importantly, that "the post-deprivation hearing before the Board's hearing committee provides no real check on the commissioner's conduct because, under the statute, and as happened here, the commissioner is free to reject the hearing committee's recommendation that the suspension be lifted." (App. 12a - 13a). The commissioner was considered to have "unfettered authority" in the summary suspension process and "[t]he absence of meaningful safeguards against arbitrary executive action" in the summary proceedings weighed against a finding of absolute immunity. (App. 13a).

The Second Circuit summarized its opinion concerning New York State's procedures governing summary suspension by stating that the procedures "lack the hallmarks and safeguards of a judicial proceeding that would render

absolute immunity for those officials involved appropriate." (App. 14a). The court, specifically noting that several circuits have granted judicial immunity to medical board examiners in license suspension proceedings, points out the differences in suspension procedures from state to state and that the procedures at issue in those cases generally provide greater protection from erroneous deprivation than that found under the PHL. (App. 14a, n.2).

(ii) The Summary Suspension Procedures Lack Due Process Protection of the Adversary Process

The commissioner may suspend a physician if, in her opinion, he poses an imminent danger to the public. This is an *ex parte* procedure wherein the physician does not have the right to advance notice, the right to counsel before the investigative committee, or the right to have the opportunity to give a competing version of the relevant facts and events. In other words, the summary suspension process requires no active participation or "adversarial" procedures. When reviewing the procedures afforded a physician under § 230, the Second Circuit correctly found that the procedures were not adversarial in nature and this weighs against absolute immunity under *Butz*. The Court found that although physicians are permitted to have an attorney present during the interview and to present countervailing evidence at the interview stage (both protections which were notably denied to Dr. DiBlasio), the interview lacks the key elements of an adversarial proceeding, such as a neutral decision maker and evidentiary rules. (App. 14a).

(iii) Erroneous Summary Suspensions Are Not Correctable on Appeal

PHL § 230 allows a physician to challenge a summary suspension prior to ultimate resolution of all charges. However, even if the committee on professional conduct agrees that the suspension should be lifted or modified the commissioner is free to reject this finding and continue the suspension, without making any findings or satisfying any legal requirements. As noted by the Second Circuit, the post-summary suspension hearing available under § 230, provides only an avenue for a review of the charges not a meaningful review of the summary suspension "because, as happened here, the commissioner is free to ignore the hearing committee's recommendation." (App. 13a). Moreover, the administrative review board, created specifically for the purpose of reviewing determinations of the committee on professional conduct, does not have the power to review the commissioner's summary suspension order. *See* § 230-c. It is also apparent that after the summary suspension and Petitioner's attendant press conferences and widespread media coverage throughout the New York area, the damage to Dr. DiBlasio's reputation was a *fait accompli* and not truly "correctable" upon appeal.

(iv) The Summary Suspension Procedure Does Not Rely Upon Legal Precedent

There is no indication in the record that the commissioner relied upon any legal precedent in making the summary suspension determination and there is no requirement, standard or procedure in the summary suspension process for the commissioner to do so. Where there is no evidence in the statute that legal precedence should be applied and no evidence from the record that the commissioner did apply legal precedent in this case, the only

conclusion to be drawn from this record and, the conclusion indeed drawn by the Second Circuit was that legal precedent played no role in the summary suspension of Dr. DiBlasio. (App. 14a). This conclusion is not in tension with the holdings of other circuits. Although it may not be found to be a controlling factor by some circuits, and there is no indication that the Second Circuit held it to be a controlling factor, it is a factor to be weighed in the *Butz* analysis. (App. 14a). This factor weighs against absolute immunity.

(v) No Insulation from Political Influence

If anything, the Second Circuit was generous to Petitioner in accepting the claim that Petitioner, a political appointee serving an elected governor, is "insulated from political influence." Although the commissioner is appointed by the governor and may hold the office until the end of the governor's term, *see* PHL §204(1), the commissioner is not insulated from external political influences. If the governor seeks a second term, the governor is free to appoint a new commissioner if he is displeased with the political implications of Petitioner's conduct or job performance. Indeed, Petitioner's conduct in seeking the summary suspension of two allegedly corrupt and negligent physicians in a high-profile media case involving a politically important demographic group, demonstrates that Petitioner placed herself in a better position to advance her own political interests and gain favor with the official who appointed her. Indeed, based upon the frenzy of resulting media coverage and phone banks being deluged by thousands of women, many of whom were never patients of Respondent or Bier, P.C., Petitioner's false and damaging disclosures during press conferences, allegedly held only to announce the summary suspension, made for attractive publicity for Petitioner as a self-proclaimed "public champion."

The *Butz* Court expressed the historical concern about the lack of independent judgment exercised by hearing examiners prior to the Administrative Procedure Act. The Butz court looked at several criteria to determine whether a public official was "insulated from political influence." *See Butz,* 438 U.S. at 513. Criteria identified by the *Butz* Court included (1) that officials should not be allowed to perform prosecutorial and investigative functions as well as their judicial functions, (strikingly similar to the concerns at issue in this case wherein the Petitioner held various roles and donned both "investigative" and "executive-decision maker" hats); (2) that officials may not perform duties inconsistent with their duties as hearing examiners, (such as happened in the instant matter wherein, as noted by the Second Circuit, Petitioner involved herself in the investigation, and then later was the final arbiter of the decision to impose and sustain the summary suspension (App. 16)); and (3) that the official be precluded from consulting any person or party, including other agency officials, concerning a fact at issue in the hearing (such as here where Petitioner's expression of "tremendous interest" in the outcome of the investigation was communicated to the sole medical investigation resulting in admitted biased). *Butz,* 438 U.S. 513-14. These characteristics are not indicative of a "neutral and detached" officer and thus weigh against absolute immunity. *Watts,* 978 F.2d at 276.

After a careful weighing of the *Butz* factors it can only be determined that absolute immunity cannot be extended to the commissioner in this matter - - the commissioner's role in the summary suspension process does not share the characteristics of the judicial process. Indeed, five of the six *Butz* factors are notably absent in this case.

Moreover, the decision of the Second Circuit does not conflict with the rulings of this Court and other courts of appeal. As dictated by this Court, absolute immunity is only accorded to officials of governmental agencies who perform

certain functions analogous to those of a judge. *Butz*, 438 U.S. at 515. The Second Circuit scrupulously employed the functional test outlined by this Court in *Butz* and determined that the commissioner's functions did not share enough of the characteristics of a judicial function to warrant absolute immunity. This decision is not in direct conflict with the Sixth, Eighth or Tenth Circuits. Each of these Circuits also applied the *Butz* factors to the facts before them and, after analyzing the relevant statutes, found that the statutes provide adequate procedural safeguards to protect physicians against unconstitutional conduct. The difference between the Second Circuit's decision and the decisions of the other circuits is a result of the different statutes under review and the role of defendants in each case. New York's PHL does not provide the procedural safeguards which are the hallmarks of a judicial proceeding and, thus, absolute immunity is not appropriate. (App. 14a). Moreover, Petitioner's role is not analogous to a judge or a prosecutor, hence she is not entitled to absolute immunity.

C. Appropriate Weight was Given to the Availability of a Prompt, Post-Suspension Hearing

The Second Circuit gives appropriate weight to the availability of a post-suspension hearing in its analysis of the summary suspension procedure under PHL § 230. The court carefully analyzed the summary suspension procedure and found that the hearing available under § 230 only provides for a review of the charges levied against a physician, not a review of the actual summary suspension. (App. 13a). The commissioner is free to completely ignore any post-suspension recommendation made by the hearing committee. The Second Circuit's conclusion was made only after a careful review of the *Butz* factors and after noting the absence of meaningful safeguards against arbitrary executive action.

(App. 13a - 14a).

The Second Circuit, while referring to *Young v. Selsky*, correctly noted that "Article 78 proceedings are generally not considered adequate avenues for 'appeal.'" (App. 14a). In *Young,* an inmate brought civil rights actions against, *inter alia,* the Director of Office of Special Housing and Inmate Disciplinary Programs for New York State Department of Correctional Services. Upon finding that the director was not entitled to absolute immunity based on facts similar to the facts before the Second Circuit in the instant matter, *i.e.*, lack of sufficient guarantee of director's independence and insulation from others in the department, the Second Circuit also noted that the type of injury alleged by plaintiff in *Young* may not be adequately correctable on appeal. *Id.* at 54. The same is true for this action. Without adequate safeguards in place to protect against unconstitutional conduct, a commissioner is allowed to summarily suspend a physician without probable cause and publicly make false accusations to irreparably harm the physician's reputation - - this damage to reputation cannot be corrected on appeal.

At first blush it appears as though the decision of this Court in *Barry v. Barchi,* 443 U.S. 55 (1977) supports Petitioner's contention that it is consistent with due process for the State to be entitled to impose an interim suspension, pending a prompt judicial or administrative hearing that would definitely determine the issues. (Petitioner's Memorandum of Law ("Petitioner's Mem."), at p.19). However, according to *Barry*, it is a necessary prerequisite of any summary suspension proceeding that probable cause be satisfactorily established. *See id.* at 64. Under the summary suspension statute currently before this Court, no probable cause was established prior to the suspension, rather it was based only upon the Commissioner's "opinion."

Under certain circumstances this Court has found that protecting the public from imminent danger justifies

summary administrative action. *See Hodel v. Virginia Surface Mining & Reclamation Assoc., Inc.*, 452 U.S. 264, 301-02 (1981). However, before summary administrative action could be justified the *Hodel* Court noted that the "criteria established" by the act had to be "specific enough to control government action and reduce the risk of erroneous deprivation." *Id.* The statute at issue in *Hodel* defined the threat of imminent danger, unlike the § 230(12) of the PHL which only defines "imminent danger" in terms of what those words mean in the opinion of the commissioner. *Id.* at 301.

Petitioner cannot be allowed to rely upon procedural safeguards which are only provided **after** a physician's license has been summarily suspended but before probable cause is established. (Petitioner's Mem., at pp.19-20). These safeguards under § 230 are only relevant to the hearing which occurred **after** the decision to summarily suspend Dr. DiBlasio was made. None of these safeguards are in place to protect a physician before a summary suspension is ordered. None of the procedures give anyone other than Petitioner the authority to modify or vacate a summary suspension order so long as the case remains pending. Instead, the commissioner may summarily suspend a physician's license without the presence of any meaningful safeguards.

D. The Second Circuit Correctly Held That The Commissioner's Role is Not Sufficiently Analogous to That of a Judge

The decision of the court below specifically notes that besides the commissioner's ultimate authority to summarily suspend a license, the commissioner's functions otherwise do not resemble that of a judge. (App. 15a). The court refers to the multiple hats worn by the commissioner in the course of the summary proceeding where she is the "overseer of the investigation, initiator of charges and summary proceedings, and final arbiter of the decision to impose and sustain the

summary suspension of a physician's license." (App. 16a). It was the blending of the investigatory, prosecutorial and judicial roles that led the court to determine that "§ 230 unduly risks compromising the independence and neutrality of the commissioner's judgment, and abrogating the checking function achieved in the judicial system." (App. 16a).

The Second Circuit's conclusion that the unacceptable blending fostered under § 230 is in line with the prior holding of this Court in *Withrow v. Larkin*, 421 U.S. 35, 54 (1975). In *Withrow,* where the issue of a dual role was raised, this Court found no evidence of bias or the risk of bias or prejudgment based on the processes utilized by the board. The Court also cautioned, however, that although a combination of investigative and adjudicative functions does not necessarily constitute a due process violation, a court is not precluded from determining from the facts before it that the risk of unfairness is intolerably high. *Id.* at 58. That is what the Second Circuit repeatedly found in the facts before it - - the actions of the commissioner under the PHL were arbitrary and provided no meaningful safeguards. (App. 13a). Section 230 was found to unduly compromise the commissioner's neutrality and the independence of her judgment. (App. 16a).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

Marina Tramontozzi
Counsel of Record

Kevin J. Harrington
John C. Mascari
Geraldine A. Cheverko
HARRINGTON, OCKO & MONK, LLP
81 Main Street, Suite 215
White Plains, New York 10601
(914) 686-4800
Attorneys for Respondent